

MEMORANDUM

To: California Truth and Healing Council

From: Mary J. Risling
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RE: California Indian Status and Identity

Date: March 19, 2024

Introduction

A Status and Identity Subcommittee was established by the CTHC, in apparent response to compelling testimony of California Indians who are not affiliated with a contemporary “federally recognized tribe.” As used here, “California Indians” are: (1) American Indians who are descended from a historic Indian tribe aboriginal to the area now comprising the State of California, but (2) not members of a contemporary “federally recognized Indian tribe”, i.e., a tribe included on the list annually published by the Bureau of Indian Affairs. (Hereafter, “BIA tribe”)¹

Presumably the CTHC report will memorialize the story that emerges from accounts of past and continuing injustices, hardships, and challenges. And will at least acknowledge the pleas for both state support for the federal tribal recognition efforts of non-federally recognized California tribes; and the calls for a state tribal recognition process. Given the complexities of federal law and consistent opposition from BIA tribes to state involvement in tribal recognition issues, it would seem addressing tribal recognition as a productive part of the CTHC’s work is a nonstarter.² Alternatively, a Status and Identity Subcommittee was convened to explore these

¹ “BIA tribe” is used in this memo as it refers to a contemporary federally recognized Indian tribes listed annually in the Federal Register as recognized by the Secretary of the Interior, pursuant to the Federally Recognized Tribe List Act of 1994. The list is administered by the Bureau of Indian Affairs (“BIA”) pursuant to 25 C.F.R. §83.6. The list contains primarily tribal groups occupying trust lands prior to development of 25 CFR Part 83 in the late 1970’s. 25 C.F.R. Part 83 contains the BIA regulations setting forth an administrative process for a group to petition for federal recognition and placement on the BIA’s list. Of course, “California Indians” as a general term would also include all members of BIA tribes. In this, for ease of understanding, the term is used in reference to the class of Indians that are not enrolled in a BIA tribe.

² BUT THEN AGAIN - The Native American Heritage Commission is presently consulting with tribes on developing “regulations concerning the qualifications and process for placement on the NAHC Contact List. The NAHC Contact List is used to determine which tribes meet the statutory definition of a ‘California Native American Tribe’ and are eligible to engage in consultation for purposes of SB-18 (tribal consultation in land use planning); AB-52 (CEQA tribal consultation); Most Likely Descendent identifications under Public Resources Code Section 5097.98; and which tribes meet the definition of ‘California Indian Tribe’ for the purposes of AB-275 (CalNAGPRA).” (NAHC Request for Tribal Consultation, Oct. 27,2023.) The proposal is a “walk like a duck . . .” version of onerous federal recognition regulations. They essentially create a state recognition process. Unless 55 non-federally recognized

issues on a more individualized basis, and in that context identify recommendations for actions by the State of California.

The CTHC posed questions for subcommittees including: What are the specific, unique issues that persist for this population, and why should there be special consideration of this community or issue? The painfully obvious answer: California Indians are the people who are, directly and via inter-generational trauma, the recipients of the egregious history of:

- Genocide
- Dispossession of traditional lands, their forms of organization and life ways
- Racism and forced assimilation
- Unjust/inhuman treatment by state and federal laws, institutions, and programs
- Termination of Indian status, initially by laws and now as victims of administrative termination at the hands of bureaucrats
- The list goes on . . . ³

California Indians are also people who are culture bearers bringing forward tribal language and ceremonies, as well as traditional values and practices tied to their historic tribal lands. Indeed, remaining in aboriginal territory and engaging in traditional practices was many times the reason these California Indians did not relocate to dispersed reservation and rancheria areas.

One need only consider a couple of examples to appreciate how significant this population is and how hypocritical and immoral it would be to advance an initiative in pursuit of truth and healing that does not fully acknowledge and advance the needs of this population. First example, Ishi – the “last Yahi,” famously exploited in books and movies by the Krobbers and the University of California Berkeley. A second striking example, revered Miwok culture bearer and leader, William Franklin, Sr., who was recently honored by a statue on state capitol grounds which replaced the toppled Junipero Serra statue. These California Indians would not fit the contemporary approach, requiring member/citizenship in of a BIA tribe. Under the prevailing approach they would be considered “unrecognized” and, hence, not an Indian.

An effort to explain how this has come to pass is not simple or easy but it is essential that this story is presented. It is also important to document both (1) that this type of injustice for California Indians is not new, and (2) accommodations to address it have and can be made to help rectify (heal) it. This memo focuses on this task.

The starting point is a few clarifying comments and Identity and Status.

tribes referenced in the NAHC Tribal Consultation Policy are grandfathered in, all of these groups will be eliminated from any NAHC list - groups that may be direct descendants of the very burials or cultural sites at issue.

³ The document abstract includes a link to the California Reparations Report, California Task Force to Study and Develop Reparations Proposals for African Americans Final Report, 2023. It lists a host of historical atrocities and summarizes harms. Although manifesting differently and in some instances much more systematically, California Indians suffered all these harms.

Identity can be a complex and personal matter and may mean different things for different people. This is left to others. For purposes of this memo, the only comment is as follows:

1. What it is: To facilitate and support meaningful state action, one's identity as a California Indian at minimum means a person who is a descendant of a historic tribal group indigenous to what is now California. Beyond this, where legal rights or benefits are involved, there are existing models that include additional criteria as appropriate to accommodate diverse programs or circumstance. For example, the special *California Indian* definition governing federal Indian Health Services includes not only California tribal descent but additional criteria accommodating history and the complexities of the real world.⁴
2. What it isn't: While of major import to all of us and something that can absolutely be supported and accommodated to various degrees, as a general matter Indian identity is not the same thing as Indian *political status*.

Status, in the context of law, refers to an individual's legal condition, encompassing their rights, obligations, capacities, and incapacities that assign them to a particular class⁵ or category. It plays a crucial role in shaping an individual's legal interactions, rights, and responsibilities.

This submission is focused on California Indian "status" and the proposition that (1) ***California Indians are federally recognized***, and (2) ***as an identifiable class of political origin*** California Indians may be the subject of special laws addressing their unique status. Despite the increasing popularity of settler colonial notions of nation states and Indian status defined as citizenship in a recognized tribe, Indian status is not coterminous with membership in a BIA tribe.

This in no way undercuts or disparages the rights and status of BIA tribes recognized as sovereigns in a government-to-government relationship with the United States. In recent decades federal legislation has resolved disputes concerning the relative governmental authority of listed tribes and established that all BIA tribes are considered sovereigns entitled to the same rights and privileges. These legal developments are important and must be respected in CTHC initiatives. However, they do not rescind centuries of laws impacting individual California Indians. And it is not necessary or moral to pit the two against each other.

⁴ The Indian Health Care Improvement Act definition of 'California Indian. 25 U.S.C. 1979(3) (references section 1679. 25 U.S.C. §1679(b) sets out the special eligibility definition for California Indians which includes: 1) Any member of a federally recognized Indian tribe; 2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant (A) is living in California, (B) is a member of the Indian community served by a local program of the Service, and (C) is regarded as an Indian by the community in which such descendant lives; 3) Any Indian in California who holds trust interests in public domain, national forest, or Indian reservation allotments in California; and 4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

⁵ In legal terms, a class refers to a group of people or things defined by one or more common attributes. Specifically, in a legal context, a class includes all individuals who fall into the same category, possess similar rights, or have suffered from the same incident.

It would be misguided to ground California's efforts to rectify and heal historic injustices in the proposition that every California Indian or non-federally recognized California tribal group must become a tribe, i.e., meet the equivalent of federal recognition standards to benefit from laws targeted at non-federally recognized tribes, or for an individual to even be considered Indian.

It is equally important to have: (1) standards and processes for identifying California Indians; (2) reasonable approaches for conducting business with non-federally recognized tribal groups; and finally, (3) to be intentional about the differences between individual California Indians, non-federally recognized tribes, and federally recognized tribes. With these distinctions firmly in mind, the state can take significant actions that meaningfully and positively impact each of these groups.

Approach

California has enacted measures intended to benefit California Indians and Tribes, both federally and non-federally recognized. Too often good intentions underlying these laws are frustrated by (1) overly narrow consideration of both history and legal policy swings creating a complicated legal landscape; (2) efforts to address issues with a simplistic or overly broad brush; and (3) undefined and imprecise terminology resulting in confusion and implementation stalemates.

Filling the knowledge gap and building a foundation for meaningful action is a daunting task. One that is far beyond what could be accomplished in a single submission. This memo serves to briefly identify essential facts, principles, and ideas that will be largely elaborated upon by an appendix of documents from multiple sources selected from both accessible and complex discussions of facts, issues, and authorities. They are listed in the Document Abstract of Appendix Items. Even these constitute only a lifting of the veil, but hopefully enough to set future action on a productive path that: (1) enhances communication by creating a shared and more uniform frame of reference, and (2) minimizes misunderstanding and needless political opposition and controversy.

At the first facilitated Identity and Status subcommittee meeting in January of 2024, the question was posed, what should the CTHC understand, acknowledge, and capture in their report? This memo elaborates on my answer - ALL of the following categories should be included. They represent pieces of a complex puzzle that, when taken together, reveal a path supporting meaningful action by the state to address the circumstances of all California Indians and tribes.

I. History of California Indians.

- a. The history of the aboriginal peoples of what now comprises California, their place-based traditional beliefs, values and life ways, as well as the reality of the continuation of traditional practices notwithstanding persistent barriers and challenges.

- b. The complicit and dishonorable role of the both the federal government and the state of California in the genocide of the aboriginal peoples of California and almost two centuries of laws, programs, and racist practices leading to well documented impacts of historical and continuing trauma with associated health, education, social and economic, and safety challenges.
 - II. The basic framework of federal Indian law.
 - III. The “Special case of California”
 - a. The California Claims cases and their role in establishing a politically based and identifiable class of California Indian people.
 - b. The role of the Bureau of Indian Affairs in identifying California Indians, as well as the role of the Bureau in administering the Indian Reorganization Act in California, leading to the current configuration of BIA tribes.
 - IV. Challenges and Recommendations
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DISCUSSION OF IDENTIFIED CATEGORIES

I. History.

- a. **The history of the aboriginal peoples of what now comprises California, their place based traditional beliefs, values and life ways, and the reality of the continuation of traditional practices notwithstanding persistent barriers and challenges.**
- b. **The complicit and dishonorable role of the both the federal government and the state of California in the genocide of the aboriginal peoples of California. Including almost two centuries of laws, programs, and racist practices leading to well documented impacts of historical trauma - associated health, education, social, economic, and safety challenges.**

These critically important subject matter areas have been the subject of considerable scholarship. This submission will simply recommend attention to a few of those resources that are focused on California.



Further information on the following informational resources is set forth in the Document Abstract of Appendix Items⁶:

1. *Connecting Land, Water and History in Native California (Timeline)*
2. *We Are the Land: A History of Native California*, Akins and Bauer
3. *2002 - Early California Laws and Policies Related to California Indians*, Kimberly Johnston-Dodds
4. *The California Indian History website*



II. The basic framework of federal Indian law.

This subject is, in significant part, also historic. However, it focuses in on a particular and unique aspect of history, that is, the special legal status of American Indians and tribes in the United States and California. Set forth below is a summary of some of the key concepts and legal developments that inform a path forward toward truth and healing.

1) Historic/Aboriginal Tribal “Sovereigns.”

Diverse historic/aboriginal “sovereign” tribal groups existed in California from time immemorial. This historic/aboriginal tribal identity persists, is present, and relevant. California Indian people, irrespective of enrollment in a BIA tribe, live in a native reality that continues to exist. There are truths, traditions, life ways tied to aboriginal tribal lands that continue to be carried out to the extent possible and despite obstacles. Historic/aboriginal California Indian tribes are the starting place for Indian and tribal political “status”.

2) Indian and Tribal Political Status.

Answers to questions involving Indians and Tribes involve the interplay of many factors. Principle factors are:

⁶ These are just a few of countless useful informational resources. Another example is film. *Tending the Wild* is an hour long public broadcast special. It can be seen on YouTube. [Tending the Wild \(Hour Long Special\) | KCET - YouTube; https://www.youtube.com/watch?v=TbxLv9EEzs8](https://www.youtube.com/watch?v=TbxLv9EEzs8) It shines light on the environmental knowledge of indigenous peoples across California by exploring how they have actively shaped and tended the land for millennia, in the process developing a deep understanding of plant and animal life. This series examines how humans are necessary to live in balance with nature and how traditional practices can inspire a new generation of Californians to tend their environment. The final 15 minutes focuses on non-federally recognized California Indians and the challenges and barriers to their exercise of cultural traditions and practices.

- The unique history of American Indian peoples as the indigenous population of the Americas; and
- The rules and workings of the Anglo-American Legal System.
 - This system & the political policy shifts over time underlie the seemingly complex/confusing/disjointed laws that govern Indian affairs today.
 - “The official story” has been subject to change over time, described as a pendulum swinging back and forth between 1) effort to eliminate Indians and Tribes, and 2) efforts to atone and strengthen tribes and Indian peoples.

The contemporary legal status of Indians and tribes was shaped by the earliest interactions between the United States and Indian Tribes. There are well established foundational principles that shape this status, but also considerable variation. *It's complicated and one size does not fit all.*

Indian political status (not race, ethnicity, or culture) is the foundation for application of special laws to Indian people without running afoul of equal protection provisions of federal and state law.

1. There is an entire body of law known as Federal Indian Law that addresses the unique legal relationship between the United States and Indian tribes.⁷
 - a. This relationship is based, in large part, on the U.S. Constitution’s recognition of Indian tribes as sovereign nations and the *history* of treaty making with tribes. The relationship is a *political* one.
 - b. The unique legal posture of the tribes in relation to the federal government is:
 - i. Deeply rooted in American history. Knowledge of historical context is perhaps more important to the understanding of Indian law than any other subject.
 - ii. Over the years the law and federal administration of it has shifted back and forth with the flow of policy shifts reflecting popular and government attitudes towards Indians.
 - iii. In recent decades policy has shifted toward tribal self-determination and notions of citizenship in a contemporary BIA tribal “nation”. Some of these BIA tribes identify to historic/aboriginal tribal groups, others reflect

⁷ Title 25 of the U.S. Code is titled “Indians” and is a multi-volumed presentation of most of the laws related to Indians and tribes. There are also regulations as well as case law addressing Indians and tribes. Popular reference books include: *The Rights of Indians and Tribes* by Steven Pevar, and *American Indian Law in a Nutshell* by William Canby, Jr.

variation resulting from how a federal law, the Indian Reorganization Act of 1934 (25 U.S.C. §461 et seq.) was implemented. Responding to this federal policy shift toward an era of tribal self-determination, in the 1980's the BIA began formalizing its relationship with Indian tribes, including producing a list of contemporary tribes recognized as in a government-to-government relationship with the United States. Recent legislation has reinforced this approach and driven a narrative that suggests Indian tribes not on the BIA list are not tribes, and Indians not members/citizens of BIA tribes are no longer Indian, since it's a political status. This shift, however, does not repeal or eliminate the reality of history and many preexisting federal laws that remain in effect and confirm the individual Indian status of California Indians.



Further information on the following resources is set forth in the Document Abstract of Appendix Items:

- 5) ***Indian Child Welfare Act Desk Reference, A Framework and Quick Reference Resource for the Practitioner.*** CDSS Office of Tribal Affairs, 2020. (Excerpts)
- 6) ***Laughing Coyote V. United States Fish and Wildlife Service, et al,*** Case No. F-93-5055, U.S. District Court, Eastern District of California
- 7) ***Bureau of Indian Affairs, Indian Child Welfare Act; Receipt of Designated Tribal Agents for Service of Notice.*** 74 Federal Register 74, 19326 (April 28, 2009)



III. The “Special case of California”

a. California Claims cases establish a politically based and identifiable class of California Indian people.

“Indians of California” have been recognized by the federal government for many purposes via a course of dealings between the government and California Indians and resulting in a politically based status.⁸ Unique to California, a federal agency service delivery system has developed that

⁸ See, e.g., 25 U.S.C. §651 et seq. (Indians of California); 25 U.S.C. §1679(b) (Indian Health Care Improvement Act, special California Indian eligibility definition).

allows verification of the Indian status of California Indians and support their eligibility for Indian services.⁹

Federal Indian law and the unique history of California create a “special case” in California, that is grounded in the acknowledgment by the federal government of the Indians of California via a treaty making process. Tragically, the process was ultimately frustrated, in significant part by the dishonorable acts of the State of California. This eventually led to what are known as the California Claims cases. These cases extensively acknowledged and documented a relationship between the federal government and the Indians of California, that is, the descendants of the historic tribal groups aboriginal to what is now the state of California. Judgments in favor of California Indians resulted in compilation of Judgment rolls listing “descendants of an Indian residing in the state on June 1, 1852.”

Subsequently, California Indians have, in turn, been defined in federal laws, such the Indian Health Care Improvement, defining them as “descendants of an Indian residing in the state on June 1, 1852.” (25 USC 1603(3), (13), (28), 1679(b)). A unique BIA administrative process for identification of California Indian people developed and remains operational today.

b. The role of the Bureau of Indian Affairs in identifying California Indians, and in administering the Indian Reorganization Act in California leading to the current configuration of BIA tribes.

Identifying California Indians.

Over time many laws and programs have relied upon “degree of Indian blood” to determine applicability and eligibility. A unique BIA administrative process developed that maintains records documenting an Individual’s total Indian blood quantum, initially identified to the

⁹ A short explanation is required detailing the reasons why there is a large number of non-federally recognized historic tribes in California as well as a large number of aboriginal California Indians unaffiliated with a BIA tribe. Tribal existence and identity is not the result of or dependent upon federal recognition or acknowledgment; tribal existence predates the United States. During the Indian treaty-making period of the 1880's the United States treated all tribes as sovereigns and all tribes were “recognized” through course of dealings and treaties with the federal government. (Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States pursuant to P.L. 102-416. (1997) Recognition report at 8.) Once the treaty-making era ended Congress continued to pass laws applying to tribes “recognized by the political department of the government.” United States v. 43 Gallons of Whiskey (1876) 93 U.S. 188, 195. These tribes included California Indian tribes. However, the government did not have one definition or approach for identifying recognized tribes until 1978, when the Department of the Interior created the Branch of Acknowledgment and Research to process tribal petitions for official recognition. (44 F.R. 7235, 1979). Thus, as that administrative process has been implemented over time, many Indian groups and individuals have found themselves excluded in the new approach to identifying Indians and tribes. Some are in the process of applying for official (Part 83) recognition, while others find the burdensome administrative process prohibitive.

historic tribal affiliation of Indian ancestors. While practices have varied over time, the BIA issued Certificates of Degree of Indian Blood (CDIB), and most recently Verifications of California Indian ancestry for California Indian people not enrolled in a BIA tribe.¹⁰ The BIA's has elected to base the process solely on the California Judgement Rolls.¹¹

Today individuals claiming eligibility for services as California Indians routinely look to the BIA for documentation. With changes over time, that documentation might take the form of a card or a certificate on letterhead issued by the BIA. The BIA issued a Certificate of Degree of Indian Blood laminated card in the 70s and 80s that verified if someone is listed on or listed as a descendant of someone listed on an approved Judgment Roll. The BIA also issued CDIBs on letterhead for every California Indian until 2015 when the CDIB instructions changed. That change is currently the subject of legal challenge due to the BIA's policy shifts in its approach to identification of historic tribal affiliations. The BIA Pacific Region now provides individuals who are not enrolled in federally recognized California Tribes only with a Verification of California Indian Descent.

Identifying BIA Tribes

Federally recognized tribes qualify to participate in virtually all federal programs. Federal recognition confirms a contemporary politically based tribal status. Recognized tribes enjoy a government-to-government relationship with the United State. This political identity may or may not correspond to the tribe's historical/aboriginal identity, something the BIA has referred to as "ancestral tribal affiliation." This is the result of the interplay of fluctuating federal law and policy together with unique historical interactions between the federal government and Indians. BIA tribes in California often do not correspond to historic/ancestral tribal groups but rather have memberships of mixed historic tribal affiliations or represent only a discrete and at times very small fraction of a larger historic/aboriginal tribal group.

Many historic/aboriginal tribes have been "recognized" by the federal government and engaged in politically based interactions, such as negotiating treaties. Largely due to the impacts of state and federal actions, they may not now be listed as contemporary BIA tribes. This is because of the approach the BIA took to implementing the Indian Reorganization Act of 1934 (25 U.S.C.

¹⁰ The BIA Pacific Region serves California. Their website states the "Division of Tribal Operations responds to individual Indian requests such as requests for Certificate of Degree of Indian Blood (CDIB), roll number verifications, completion of SF 4432 – Indian Preference Hiring, verification of individual Indians on the California Judgment Rolls, and **verifications of California Indian ancestry**. Further, Tribal Operations provides verification for the state of California free fishing licenses for California Indians and DMV tax exemption verifications. [Tribal Operations | Indian Affairs \(bia.gov\)](#)

¹¹ As policy and program eligibility standards have shifted away from blood quantum to reliance on membership in a BIA tribe, federal funding support for services for California Indians not enrolled in a BIA tribe has disappeared in favor of formulas prioritizing BIA tribes. The BIA currently has no budget to support this population. It does not operate a program to administratively consider sources of proof of California Indian ancestry other than the Judgment Rolls.

§461 et seq.), a federal law that allowed a tribe or tribes occupying a reservation to organize as a tribe.

In California, under the California Rancheria Act, small parcels of land throughout the state were obtained by the BIA in trust status for landless/homeless California Indians. Subsequently, as the BIA implemented the Indian Reorganization Act, the BIA generally treated each of these small parcels as reservations and allowed only the Indian occupants of each of these small parcels to organize as a tribe.¹² Some were subsequently “terminated” and later restored via legislation or litigation. With a BIA focus on trust lands, California Tribes selected for inclusion on the list of federally recognized tribes corresponded to these sometimes-small groups of individual Indians occupying rancheria areas at the time the BIA implemented the Indian Reorganization Act, or as identified on termination rolls when a previously terminated group was unterminated. The larger historic tribal group not occupying these rancheria/reservation lands were not afforded an opportunity and, most importantly, any support to organize and thus ended up largely excluded from the BIA list. The BIA has developed regulations for excluded groups to petition for recognition, but the process is extensive and very expensive. As well, it requires official government documents, such as judgment rolls, that are inaccessible to individuals and groups seeking to demonstrate their Indian and tribal status.

In the 1980's, when the BIA first started publishing the Part 83 list, it included as tribes only the Indians occupying the reservations and rancherias located in the state. Tribal names frequently corresponded to contemporary place names or the seller's name. Hence, an anomaly developed in California where one family or a small group of Indians residing on each of several parcels of rancheria trust land within a historic tribe's aboriginal territory was deemed a federally recognized, quasi-sovereign tribal nation. For this reason, there is not, for example, a single Miwok Tribe but rather several small tribes identified by the BIA as possessing an affiliation with the historic or ancestral Miwok Tribe. The larger historical tribal group did not fit into this administrative approach. Initially, the BIA administered programs in a manner that continued to acknowledge and serve the larger California Indian population. However, under the prevailing policy increasingly equating tribal political status with listing as a BIA tribe, and Indian status with membership in a BIA tribe, increasing numbers of California tribes and Indians find themselves treated as “non-federally recognized” and their Indian status **terminated**. This is the case even though these Indians can receive verification of their status as California Indians from the BIA, expressly qualify for some federal and state Indian services, and may hold interests in lands held in trust by the United States for their benefit as Indians. This is wrong and unnecessary. As individuals in California enjoy rights and benefits without being a state, so to California Indians can and should be afforded rights and benefits without becoming a BIA tribe.

Response to the unique circumstance of California Indians is evolving. The swing of the federal policy pendulum has swung to their detriment. However, any state “healing” effort must recognize this problem and include measures to reverse this grievous injustice.

¹² A notable exception is the Pit River Tribe whose aboriginal territory included several small rancherias. Years of resistance and litigation ultimately resulted in recognition of a single federally recognized tribe with jurisdiction over several of these land areas.



Further information on the following resources is set forth in the Document Abstract of Appendix Items:

- 8) **Briefing Paper: An Overview of the Historical Factors Which Have Contributed to the *Special Status Problems of California Indians***, California Indian Legal Services, 1993
- 9) ***Aboriginal Title, the Special Case of California***, Flushman and Barbieri, 17 Pac.L.J. 391 (1986)
- 10) ***BIA history of Award to California Indians***
- 11) ***Sample – Bureau of Indian Affairs, Pacific Region - Verification of California Indian Descent***
- 12) ***Interior Board of Indian Appeals (IBIA), Morgan Uderwood, Sr. v. Deputy Assistant Secretary – Indian Affairs (Operations), 1986***
- 13) ***Malone v. BIA, (1993) Case No. 93-15011, U.S. Court of Appeals for the 9th Circuit.***



IV. Challenges and Recommendations

Challenges

The Use of Inconsistent and/or Imprecise Terminology.

The use of inconsistent or imprecise terminology creates tension with tribes and may frustrate a law's intended purpose and effective implementation. State statutes and California Departments use a multitude of terms relating to Indians and tribes.¹³ Examples include indiscriminately used and often undefined terms such as:

American Indian; Indian; Indian ancestry; Native American; Native American heritage; Indian Tribe; California Native American Tribe; Non-Federally Recognized Tribe; ICWA Eligible; On or near reservation service area . . .

To allow meaningful implementation and achieve compliance with state laws, it is important that terms be clearly defined and carefully and consistently applied. Federal Indian law involves more than a century of legislation and case law responding to the unique history, status, and changing circumstances of American Indians and tribes. Federal law contains express definitions, many specific to a particular context. Included in the Appendix as item number 5 is an excerpt from the

¹³ Many state agencies are required to collect racial data. For this purpose American Indian or Alaska Native is defined as having "origins in any of the original peoples of North or South American (including Central America), and maintains Tribal affiliation or community attachment." *Race ≠ Political Status*. This involves self-identification and IS NOT the same thing as political status. Race, ethnicity/culture are relevant for some purposes, but the application of laws to only certain classes of Indian people or groups is based not on race but on political status.

Glossary of the *Indian Child Welfare Act Desk Reference*. The glossary was developed in the context of design of the California Department of Social Services statewide data collection system for foster care placements. An examination of the definitions of Indian and Tribe relevant to implementation of ICWA readily demonstrate the need for clear and imprecise terminology.

Recommendation

The state should create a working group to address the confusion resulting from inconsistent and undefined terms indiscriminately used to refer to the indigenous population of California.

In the absence of clearly defined terms and a solid understanding of the various classes of Indians and tribes in California, it seems the state's implementation response is to rely on the easiest approach and focus solely on (prioritize) BIA tribes and their member/citizens. This essentially frustrates beneficial implementation on behalf of California Indians and non-federally recognized tribes.

By way of example, my Karuk grandfather was a primary proponent of what is now CA Govt. Code §186, as well as the legislation creating the NAHC. This legislation was enacted prior to the shift in focus to Indians as citizen members of BIA tribes. These laws were motivated by California Indians concerned about threats to traditional cultural practices and ceremonies, as well as protection of graves and sensitive sites. They were aimed at access issues and support for the defense and maintenance of these practices and sites. At that time, notice and consultation was not a formal government interaction but an opportunity for California Indians to be notified of activities directly impacting the bones of their ancestors or their lives as Indian people. The NAHC was conceived as a resource to support this effort. Subsequently, the mission of the NAHC was broadened by land use and environmental laws, increasingly focusing on government-to-government consultation, and imposing significantly different requirements not only on the NAHC but on other agencies and local governments as well.

Recently the NAHC list of tribes that had developed over time to include 55 non-federally recognized tribes¹⁴ suddenly and summarily disappeared. Proposed regulations to govern inclusion on the NAHC's list of tribes are in the consultation process. They significantly mirror federal recognition standards. If tribes had the resources and support to undertake these arduous and expensive requirements they would likely be federally recognized. They do not and are not.¹⁵ Thus, the practical effect is that no non-federally recognized tribes will be on the list. Individual California Indians, likewise, do not appear to be a focus of concern for the NAHC whose staff is busy with mounting duties on behalf of BIA tribes and the Governor's office. This frustrates the original intent of the NAHC legislation and is effectively administrative termination on the state level. This is wrong.

¹⁴ 55 is the number identified in the NAHC Tribal Consultation Policy.

¹⁵ An alternative approach for determining non-federally recognized tribes to include on the NAHC list might be to set out minimum requirements that establish an identifiable business entity, specify geographical areas of connection, membership, and governing processes, including identification of authorized representatives. Federal grant programs, such as the Administration for Native Americans and Indian Health Service have funded non-federally recognized tribes operating as non-profit corporations with a majority Indian membership.

A choice between BIA tribes on the one hand and California Indians and Non-Federally Recognized Tribes on the other is not necessary. Careful attention to the intent of legislation together with the use of appropriate terminology that clearly communicates what class(s) of Indians and tribes are implicated, can allow varied/appropriately targeted processes and benefits for each. (Item 19 in the appendix, the ICWA Inquiry Chart, sets forth one example of how comparatively subtle but precise language can impose significantly different legal rights and duties.)

A serious effort to address this problem should involve a team including a lead agency and attorney and policy staff from each state agency together with California Indians, tribal representatives, and knowledgeable consultants as needed. An appropriate budget should be allocated to support the participation of Indian and tribal representatives, and to engage any needed consultants. It may seem like a lot, but state agencies undertake such reforms and are staffed to accomplish them. Additionally, they have “Tribal Liaisons” to assist with coordination. Such an effort might, for example, include the following:

- a. Each Agency assign an attorney to compile the text of laws referencing the various terms used regarding Indians and Tribes and report back on how each relevant agency understands and implements the language. (Sounds like a lot, but compilation is a computer search, and many of these provisions are not actually implemented.)
- b. The team develops recommendations on terminology to clearly identify targeted classes and changes that may be appropriate to achieve the intended/desired result of the legislation.
- c. The team drafts proposed amendments, and the lead agency initiates formal tribal consultation and advances technical amendments to eliminate this barrier to effective implementation of California laws.
(Sounds like a lot and it is, but I participated as a consultant in development of technical amendments impacting major portions of the Family, Probate, and Juvenile Code.)

Challenges

As previously mentioned, California Indians are the people who are, directly and via inter-generational trauma, the recipients of the egregious history of:

- Genocide
- Dispossession of traditional lands, their forms of organization and life ways
- Racism and forced assimilation
- Unjust/inhuman treatment by state and federal laws, institutions, and programs
- Termination of Indian status, initially by laws and now as victims of administrative termination at the hands of bureaucrats
- The list goes on . . .

The document abstract includes a link to the *California Reparations Report, California Task Force to Study and Develop Reparations Proposals for African Americans Final Report*. It lists a host of historical atrocities and summarizes harms. Although manifesting differently and in some instances much more systematically, California Indians suffered all these harms.

Also listed in the document abstract and included in the appendix to this memo, is a copy of the *Summary Report, California Consultation Meeting*, this report provides a summary of a 1991 statewide consultation meeting with California Indian tribes and organizations convened by The National Indian Policy Center Planning Office. It identifies the major issues emerging from the testimony provided. It is only one of *many* such efforts that repeatedly highlight numerous continuing issues and problems faced by California Indians.

Recommendation

California should put its money where its mouth is. The *California Reparations Report, California Task Force to Study and Develop Reparation Proposal for African Americans Final Report*, at page 597, references the June 2019 apology issued to California Native Americans. It notes “This apology was not accompanied by compensation or remuneration, or any other form of reparations intended to redress the violence, exploitation, dispossession, and the attempted destruction of tribal communities, but the Council established by Executive Order N-15-19 may recommend further measures of reparation and restoration.”

The Council should carefully examine the Final Report, its reliance on international principles of reparations, examples of reparative efforts, and conclusions that monetary compensation is in order. Methodologies for calculating the various types of identified harms are instructive. The Final Report looks not simply to the Executive but also to the Legislature to create and fund a method for eligible individuals to submit claims and receive compensation or restitution, including (1) supporting claimants in obtaining evidence to substantiate qualifying claims; (2) providing advocates to assist applicants with claims; (3) reviewing and determining the sufficiency of the claims and amount of restitution required to make the individual whole; and (4) ensuring that direct payments are timely remitted to eligible applicants.

Challenge

The BIA previously issued Certificates of Degree of Indian Blood (CDIB) to California Indians. They have ceased issuing CDIBs to California Indians and currently provide only verifications that an individual is a descendant of an Indian residing in the state on June 1, 1852. However, there are numerous problems with the BIA’s process:

- a. As a matter of policy, the BIA relies solely on California Judgement Rolls as their starting point for both CDIBs and Verifications. They provide no mechanism for consideration of other sources of evidence. “Unrecognized” California Indians who may have other sources of evidence, such as Mission records or other historical documents, have no forum for consideration of such evidence.
- b. The BIA’s process requires an applicant to provide certified governmental records to demonstrate their connection to their ancestor. This might involve accessing paternity

judgments and records from dispersed locations. This can be time consuming and prohibitively expensive for Indians of limited means and no support.

- c. In a systematic effort to administratively terminate California Indians, the BIA has shifted funding streams to exclude this population. There is no funding allocation or line item for services to California Indians, including for staff to process verifications. This policy approach compromises the status of California Indians as federally recognized Indian people entitled to enjoy the benefits of federal laws such as those involving possession of Eagle feathers, and the right to market art as Indian made.
- d. The Pacific Region Office of Tribal Services is charged with issuing Verifications of California Indian Descent. The office currently has no staff and a backlog of work involving tribal issues, assuring delay in response to requests from California Indians.
- e. Perhaps most egregious, the BIA has most recently and arbitrarily instituted a policy that when issuing a CDIB only Indian blood of a member of a BIA tribe can be counted in calculating Indian blood quantum. California Indians not in a BIA tribe are effectively terminated as Indians.

Recommendation

California should step up on behalf of its California Indian population and support California Indians in meaningful ways, including:

- a. Providing support for verifying California Indian Status.

California Indians are a federally recognized class of Indian people. As such the BIA has a trust responsibility to them that it is breaching. The state should act on behalf of California Indians. This might include working with California congressional representatives for corrective legislation. Alternatively, the Attorney General should explore a lawsuit against the BIA, in parens patriae on behalf of California Indians, to require the BIA to confirm the recognized Indian status of California Indians, establish an administrative process for accepting evidence other than a California Judgement Roll, and allocate appropriate funding to meet its trust obligations. The state may need to assert a direct interest in the issue, and it has one. The state has responsibilities to Indian children and families imposed by the federal Indian Child Welfare Act (ICWA). That act also expressly imposes a duty on the BIA to help a state identify a child's tribe. The BIA's arbitrary and capricious policy changes, its inconsistent practices modifying and limiting information contained on CDIBs, its bizarre policy on what constitutes Indian blood, threaten state ICWA compliance. It should be noted, many tribal constitutions are based on BIA boiler plates that include a specified "Indian" blood quantum requirement and count all Indian blood.

- b. Elevating response to California Indians and non-federally recognized tribes by establishing an office for the purpose of supporting California Indians and non-federally recognized California tribes. This might include a position that serves as a responsive point of contact, provides advocacy with state agencies, consults regularly with these groups, and assists with

accessing official records and documents that are relevant to establishing status, but increasingly shrouded behind privacy claims.

- c. Creating an initiative that identifies measures the state can take for the benefit of California Indians. For example, California Indians are culture bearers bringing forward tribal language and ceremonies, as well as traditional values and practices tied to historic tribal lands. Develop a process that grants California Indians free access to public lands, allows cultural and ceremonial activities, and privileges for gathering traditional materials.



Further information on the following resources is set forth in the Document Abstract of Appendix Items:

- 14) **California Executive Order B-10-11, reaffirmed and incorporated by reference in California Executive Order N-15-19 (creating the CTHC)**
- 15) **Native American Heritage Commission (NAHC) Tribal Consultation Policy, 2016**
- 16) ***The California Reparations Report, California Task Force to Study and Develop Reparation Proposals for African Americans Final Report, 2023***
[Full Report - The California Reparations Report - Final Report - AB 3121 - California Department of Justice; https://oag.ca.gov/system/files/media/full-ca-reparations.pdf](https://oag.ca.gov/system/files/media/full-ca-reparations.pdf)
- 17) **Examples of California Codes.** Laws that address needs of California Indians and non-federally recognized California Tribes:
 - a) California Government Code §186
 - b) 2023-2024 Supplemental Sport Fishing Regulations
 - c) California Welfare and Institutions Code §306.6
 - d) California Welfare and Institutions Code §16001.9

18) ***Summary Report, California Consultation Meeting, 1991***

Summary of a 1991 statewide consultation meeting with California Indian tribes and organizations convened by The National Indian Policy Center Planning Office. The report summarizes the major California issues identified. It is only one of *many* such efforts that repeatedly highlight numerous continuing issues and problems faced by California Indians.

19) ***ICWA Inquiry Chart, California Department of Social Services, Office of Tribal Affairs.***

